Gala v. Preston [1991] 172 CLR 243, at p. 253). Certainly, the duty to warn extends to risks of that kind involved in the treatment or procedures proposed.

Again leaving aside cases involving a medical emergency or a situation where the circumstances of the individual require special consideration, I see no basis for treating the doctor's duty to warn of risks (whether involved in the treatment or procedures proposed or otherwise attending the patient's condition or circumstances) as different in nature or degree from any other duty to warn of real and foreseeable risks. And as at present advised, I see no basis for any exception or "therapeutic privilege" which is not based in medical emergency or in consideration of the patient's ability to receive, understand or properly evaluate the significance of the information that would ordinarily be required with respect to his or her condition or the treatment proposed.

The appeal should be dismissed.

WEBB

v.

EMO AIR CARGO (UK) LIMITED

HOUSE OF LORDS
LORD KEITH OF KINKEL, LORD GRIFFITHS, LORD BROWNE-WILKINSON, LORD MUSTILL, LORD SLYNN OF HADLEY
26 NOVEMBER 1992

LABOUR LAW: Sex discrimination - Sections 1, 2, 5 and 6, Sex Discrimination Act 1975 - Direct or indirect discrimination - Article 2(1) Directive 76/207 - Council of European Communities.

The appellant was employed by the respondents as a clerk to replace another clerk who was pregnant. After commencing work she found out that she herself was pregnant. Upon discovering this, the respondent dismissed her. The Tribunal found that the respondent treated male and female employees alike and both were given full pay on sick leave without a specific time limit. Also the Tribunal decided that had the appellant revealed that she was pregnant at her initial interview she would not have been offered the job. It dismissed the appellant's claim that her dismissal constituted direct discrimination on the ground of sex, or alternatively indirect discrimination, contrary to the Sex Discrimination Act, 1975. The appellant's appeal to the Employment Appeal Tribunal and the Court of Appeal were dismissed. Leave was granted to appeal to the House of Lords.

Held:

[1] The precise reason for the unavailability for work is not relevant under s. 5(3) of the 1975 Act. It is also not relevant that the reason is a condition which affects only women, or for that matter only men. This view derives support from s. 2(2) of the Act. Therefore the appellants dismissal did not constitute direct unlawful discrimination.

[2] Earlier European Court decisions did not indicate whether regard should be taken of a situation where an employer refuses to engage a woman for her unavailability for the job and not for her pregnancy. Hence referral should be made to the European Court the following question for determination:

Is it discrimination on grounds of sex contrary to Directive 76/207 for an employer to dismiss a female employee

(a) whom he engaged to replace another employee during the latter's maternity leave.
(b) when upon discovering the employee's pregnancy the employer dismisses her because she would not be able to replace another employee during the period of her confinement
(c) had the employer been aware of the employee's pregnancy at the date of employment, he would not have appointed her; and
(d) the employer would in similar circumstances have dismissed a male employee who would require leave during the relevant time.

[Appeal adjourned pending consideration of the question by ECJ]

Cases referred to:
Turley v. Allders Department Stores Ltd. [1980] I.C.R. 66 ***(refd)***
Hayes v. Malleable Working Men's Club and Institute [1985] I.C.R. 703 ***(refd)***
James v. Eastleigh Borough Council [1990] 2 A.C. 751 ***(refd)***
Reg. v. Brimingham County Council, Ex parte Equal Opportunities Commission [1989] A.C. 1155 ***(refd)***
Ojutiku and Obuzuni v. Manpower Services Commission [1982] I.C.R. 661 at p. 668 ***(refd)***
Hampson v. Department of Education and Science [1990] 2 All ER 25 ***(refd)***
Dekker v. Stiching Vormingscentrumvoor Jong Volwassenen (V.J.V.-Centrum) Plus [1990] ECR 1-3941 ***(refd)***
Handels-og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening [1990] ECR 1-3979 ***(refd)***
Duke v. G.E.C. Reliance Ltd. [1988] A.C. 618 ***(refd)***
Marleasing S.A. v. La Comercial Internacional De Allimentacion S.A. [1992] 1 CMLR 305 ***(refd)***

Legislation referred to:
EEC Treaty, Article 177, 189
Equal Pay Act 1970, s. 1(3)
Sex Discrimination Act 1975, ss. 1(1), 2, 5, 6(1), 6(2)

JUDGMENT

Lord Keith of Kinkel

My Lords,

This appeal involves a difficult and interesting question in the field of sex discrimination, namely whether an employer is guilty of such discrimination, direct or indirect, when he dismisses a female employee, shortly after engaging her, on learning that she is pregnant and therefore will not be available for work at the time when the task for which she was specifically recruited falls to be performed.

The facts of the case are stated in the decision of the Industrial Tribunal, the appellant, Ms. Webb, being there described as "the applicant" and the employers, EMO Air Cargo (UK) Ltd., ("EMO") as "the respondents", their managing director being Mr. Fullicks. The statement of facts is as follows:

> The applicant was engaged by the respondents by a letter of 26 June 1987 as an Import Operations Clerk, subject to a three months probationary period. She started work on 1 July 1987. The respondents have 16 employees (male and female), four of whom are in the Import Department. At her interview, the applicant was told that the job was available because another of the Import Operations Clerks (Valerie Stewart) was pregnant. Valerie Stewart intended to work until the end of the year and to return after maternity leave. That the applicant needed about six months' training from Valerie Stewart so as to be able to replace her. Valerie Stewart's baby was due on 16 February 1988. The return of Valerie Stewart would not mean that the applicant would have to leave. About two weeks after starting work, the applicant thought she herself might be pregnant and told Valerie Stewart. The applicant had no such suspicion at the start of her employment. This matter came to the ears of Mr. Fullicks who called the applicant to his office the following day. The applicant said she thought she was pregnant, but was not sure. Mr. Fullicks told her that he had no alternative but to dismiss her, but she could choose whether to leave that day or at the end of the month. Having chosen the latter, she received a letter dated 30 July 1987 on 30 July, stating 'you will recall that at your interview some four weeks (ago) you were told that the job for which you applied and were given had become available because of one of our employees becoming pregnant. Since you have only now told me that you are also pregnant I have no alternative other than to terminate your employment with our company'. Her pregnancy was in fact confirmed during the week after the meeting with Mr. Fullicks. She did not tell Mr. Fullicks of the confirmation, but we consider that nothing turns on this. The applicant's confinement is expected on 8 March 1988. The applicant would have liked to have been able to return to work with the respondents.

The Tribunal went on to find that EMO had no formal sick pay scheme but that in practice an employee was given full pay on sick leave without a specific time limit. Male and female employees were treated alike. In one instance a female employee had two to three months sick leave in hospital on full pay, and ordinarily the position would be the same for one having a baby, resulting in three months absence, but the appellant was engaged to take the place of Valerie Stewart during the latter's absence due to pregnancy. If the appellant had said at her initial interview that she might be pregnant she would not have been offered the job.

The appellant's claim that her dismissal constituted direct discrimination against her on the ground of her sex, or alternatively indirect discrimination, contrary to the Sex Discrimination Act 1975, was dismissed by the Tribunal. It held that the real reason for the dismissal of the appellant was her anticipated inability to carry out the primary task for which she had been recruited, namely to cover the job of Valerie Stewart during the latter's absence on maternity leave, and that a man recruited for the same purpose would have been treated similarly if he had declared that he required to be absent during the critical period.

Appeals by the appellant to the Employment Appeal Tribunal and from it to the Court of Appeal (Glidewell, Balcombe and Beldam LJJ) were unsuccessful. She now appeals to your Lordships' House with leave granted by the Court of Appeal.

The immediately relevant provisions of the Act of 1975 are these.

Section 1 (1)

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if -

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

Section 2

(1) Section I, and the provisions of Parts II and III relating to sex discrimination against women, are to read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.

(2) In the application of subsection (1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.

Section 5

(1) In this Act -

(a) references to discrimination refer to any discrimination falling within ss. 1 to 4; and

(b) references to sex discrimination refer to any discrimination falling within ss. 1 or 2,

and related expressions shall be construed accordingly.

(2) ...

(3) A comparison of the cases of persons of different sex or marital status under s. 1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Section 6(1)

It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman -

...

(c) by refusing or deliberately omitting to offer her that employment.

Section 6(2)

It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her -

...

(b) by dismissing her, or subjecting her to any other detriment.

The appellant's case alleges direct discrimination contrary to ss. 1(1)(a) or alternatively indirect discrimination contrary to ss. 1(1)(b).

It is the case on direct discrimination which poses the really difficult problem. Section 1(1)(a) requires a comparison to be made between the treatment accorded to a woman and the treatment accorded or that would be accorded to a man. Here there is no treatment actually accorded to a man which can be the subject of comparison. So it is necessary to consider what treatment would be accorded to a man, and under s. 5(3) it is necessary to assume that the relevant circumstances in the case of the hypothetical man are the same as or not materially different from the circumstances in which the treatment complained of was accorded to the woman. What in this case are the relevant circumstances which are to be assumed to be present in the case of the hypothetical man? Obviously they cannot include the circumstance that the man is pregnant, for that is impossible. This led a majority of the Employment Appeal Tribunal in *Turley v. Allders Department Stores Ltd.* [1980] ICR 66 to hold that dismissal of a woman on the pure ground of pregnancy could not constitute unlawful discrimination, comparison with a man who was in like position being impossible. Ms. Pat Smith dissented, taking the view that the proper course was to compare the position of a pregnant woman with that of a man who by reason of some medical condition required a period off work equivalent to what a woman would require for her confinement. In *Hayes v. Malleable Working Men's Club and Institute* [1985] ICR 703 an Employment Appeal Tribunal differently constituted upheld the dissenting opinion of Ms. Smith in *Turley's* case. The Court of Appeal followed the same line in the present case. Glidewell LJ said ([1992] 2 All ER 43, 52):

> To postulate a pregnant man is an absurdity, but I see no difficulty in comparing a pregnant woman with a man who has a medical condition which will require him to be absent for the same period of time and at the same time as does the woman's pregnancy.

There can be no doubt that in general to dismiss a woman because she is pregnant or to refuse to employ a woman of child bearing age because she may become pregnant is unlawful direct discrimination. Child-bearing and the capacity for child-bearing are characteristics of the female sex. So to apply these characteristics as the criterion for dismissal or refusal to employ is to apply a gender-based criterion, which the majority of this House in *James v. Eastleigh Borough Council* [1990] 2 AC 751 held to constitute unlawful direct discrimination. In that case the council had adopted the attainment of pensionable age, 65 for men and 60 for women, as the condition for being eligible for free use of their swimming pool. In the present case, however, there was not any direct application of a gender-based criterion. If the appellant's expected date of confinement had not been so very close to that of Valerie Stewart she would not have been dismissed. It was her expected non-availability during the period when she was needed to cover for Valerie Stewart which was the critical factor. The question is whether it is legitimate to make a comparison between the non-availability of a woman by reason of expected confinement and the non-availability of a man, which may or may not be for medical reasons, for the purpose of postulating relevant circumstances under s. 5(3) of the Act. If it is not legitimate, then cases can be envisaged where somewhat surprising results would follow. For example, an employer might require to engage extra staff for an event due to take place over a particular period, such as the Wimbledon fortnight or the Olympic Games, and for which a period of training is required. He advertises some months in advance and ten candidates apply - five men and five women, all better qualified than the men, one of whom is pregnant, her confinement being expected to be on the first day of the event. The employer requires only four extra staff and he engages the four women who are not pregnant. Has there been direct discrimination against the pregnant woman? Mr. Sedley QC, for the appellant here, would answer that question affirmatively, saying that the pregnant woman has been deprived, on grounds of her sex, of one-fifth of a chance of being selected and should be compensated accordingly. He relies on the "but for their sex" test adumbrated by Lord Goff of Chieveley in *Reg. v. Birmingham County Council, Ex parte Equal Opportunities Commission* [1989] AC 1155. That was a case where the Council operated single sex grammar schools for boys and for girls. There were fewer places in the girls' schools than there were in the boys' and as a result the girls had to gain higher marks in the entrance examination than did the boys in order to obtain a place. It was held in the Court of Appeal and this House that the Council was in breach of the Act of 1975. Lord Goff of

Chieveley, in the course of a speech concurred in by the other members of the appellate committee, said at p. 1194:

> There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex.

This test was approved and applied by Lord Bridge of Harwich in *James v. Eastleigh Borough Council (supra)* at pp. 765-766. In my opinion, however, the test so formulated is not capable of application to the circumstances of this case. The appellant was not dismissed simply because she was pregnant but because her pregnancy had the consequence that she would not be available for work at the critical period. It is true that but for her sex she would not have been pregnant, and but for her pregnancy she would not have been unavailable then. If the "but for" test applies to that situation, it must equally apply where the reason for the woman's being unavailable at the critical time is that she is then due to have an operation of a peculiarly gynaecological nature, such as a hysterectomy. But a man may require to undergo an operation for some condition which is peculiar to males, such as an abnormal prostate. Is the "but for his sex" test to be applied so as to produce a finding of unlawful discrimination where he is not engaged because the impending operation will make him unavailable when his services are particularly required? Both in the *Brimingham County Council* case and in the *James* case members of one sex were treated unfavourably by comparison with actual members of the other sex. The problem of postulating relevant circumstances for the purpose of making a comparison with the treatment accorded to hypothetical members of the opposite sex did not arise. The circumstances in the case of a woman due to have a hysterectomy are different from the circumstances in the case of a man due to have a prostate operation. The question is whether they are materially different, and the answer must be that they are not, because both sets of circumstances have the result that the person concerned is not going to be available at the critical time. Then it has to be considered whether there is something special about pregnancy which ought to lead to the conclusion that the case of a woman due to be unavailable for that reason is materially different from the case of a man due to be unavailable because of an expected prostate operation. In logic, there would not appear to be any valid reason for that conclusion. It is true that pregnancy may be said to be a normal condition, not an abnormal pathological condition such as to require a hysterectomy, but the consequences of both are the same, namely unavailability of the person when particularly needed. The argument for the appellant is that when comparison is made between a pregnant woman, who is going to be unavailable on account of her confinement at the critical time, and a man, then because a man could not be unavailable for the same reason dismissal of or failure to engage the pregnant woman constitutes discrimination. But the correct comparison is not with any man but with an hypothetical man who would also be unavailable at the critical time. The relevant circumstance for purposes of the comparison required by s. 5(3) to be made is expected unavailability at the material time. The precise reason for the unavailability is not a relevant circumstance, and in particular it is not relevant that the reason is a condition which is capable of affecting only women, or for that matter only men.

This view of the matter derives some support from s. 2(2) of the Act, since that provision appear to envisage that there may be relevant circumstances affecting a man which are not materially different from those attributable to the state of pregnancy in a woman, so that if the pregnant woman received more favourable treatment than the man, then but for the subsection the man would be entitled to complain of unlawful discrimination. If comparison between a man and a pregnant woman were impossible in any circumstances, which is the premise upon which the appellant's argument is based, then the subsection would be pointless.

I conclude that on a proper construction of the relevant provisions of the Act of 1975 the appellant's dismissal did not in the circumstances of this case, as found by the Industrial Tribunal, constitute direct unlawful discrimination.

Turning now to the matter of indirect discrimination, the Industrial Tribunal found that subparagraphs (1) and (iii) of s. 1(1)(b) of the Act of 1975 were satisfied as regards the appellant. As regards subparagraph (i), the Tribu-

nal's reason was that the relevant condition in their view was that the worker should not in July 1987 be in such a physical condition as to be unable to do the job in question, and that more women than men were likely to be unable to satisfy this condition, on account of the possibility of pregnancy. As to subparagraph (iii), the Tribunal found that the appellant suffered the detriment of dismissal because she could not comply with this condition. But the Tribunal held that the employer had shown the condition to be justifiable irrespective of the sex of the appellant on account of the reasonable needs of the employers' business, which were that there should be someone to cover for Valerie Stewart during her maternity leave, which the appellant would be unable to do. So the Tribunal decided that the case fell within subparagraph (ii) of ss. 1(1)(b), and that there had therefore been no indirect discrimination. In doing so it relied upon the test of what is justifiable expressed by Eveleigh LJ in *Ojutiku and Obuzuni v. Manpower Services Commission* [1982] ICR 661 at p. 668.

After the Industrial Tribunal had given its decision, there was decided in the Court of Appeal the case of *Hampson v. Department of Education and Science* [1990] 2 All ER 25, in which Balcombe LJ thus formulated the test of what was "justifiable" under subparagraph (ii):

> In my judgment ' justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This construction is supported by the recent decision of the House of Lords in *Rainey v. Greater Glasgow Health Board* [1987] ICR 129, a case under the Equal Pay Act 1970, and turning on the provisions of section 1(3) of that Act. ...

This test must now be regarded as the appropriate one and as superseding that of Eveleigh LJ in *Ojutiku*.

It was submitted on behalf of the appellant that since this was the correct test and it had not been applied by the Industrial Tribunal the case should be remitted for reconsideration in the light of it. The same submission was made to the Court of Appeal, which rejected it upon the view that if the Industrial Tribunal had applied the correct test as formulated by Balcombe LJ it would inevitably have come to the same conclusion. I agree with that view and find it unnecessary to say more.

Up to this point I have proceeded upon the basis of the relevant provisions of the Act of 1975 considered in isolation. It is, however, necessary to take into account certain recent decisions of the European Court of Justice. The decisions are concerned with the interpretation of Directive 76/207 of the Council of the European Communities, Article 2(1) of which states:

> For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

The first decision is *Dekker v. Stichting Vormingscentrumvoor Jong Volwassenen (V.J.V.-Centrum) Plus* [1990] ECR I-3941. The facts were that Mrs. Dekker applied for a job with VJV and informed the selection committee that she was three months pregnant. The committee recommended her to the board of VJV as being the most suitable candidate for the job, but the board decided not to employ her. The reason was that under the applicable law of the Netherlands, VJV would have been required to pay Mrs. Dekker 100% of her salary while she was absent owing to her confinement, but would not have been in a position to recover the amount so paid from its insurers because her pregnancy was a condition known about at the time her employment would have commenced. In that situation VJV would not have been able to afford to pay a replacement for Mrs. Dekker and this might have led to a staff shortage. The Dutch courts held that the domestic equal treatment legislation had been breached, but that VJV had a justifiable ground for the breach. The Supreme Court, considering that the true interpretation of the Community Directive had a bearing on the meaning to be attributed to the domestic legislation, referred a number of questions to the European Court, the first of which asked:

> Is an employer directly or indirectly in breach of the principle of equal treatment laid down in Articles 2(1) and 3(1) of the Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment ...) if he refuses to enter into a contract of employment with a candidate, found by him to be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post ...?

In relation to this question the relevant passages in the judgment of the court were these:

> 10. Consideration must be given to the question whether a refusal of employment in the circumstances to which the national court has referred may be regarded as direct discrimination on grounds of sex for the purposes of the directive. The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.
>
> 11. The reason given by the employer for refusing to appoint Mrs. Dekker is basically that it could not have obtained reimbursement from the Risicofonds of the daily benefits which it would have had to pay her for the duration of her absence due to pregnancy, and yet at the same time it would have been obliged to employ a replacement. That situation arises because, on the one hand, the national scheme in question assimilates pregnancy to sickness and, on the other, the Ziekengeldreglement contains no provision excluding pregnancy from the cases in which the Risicofonds is entitled to refuse reimbursement of the daily benefits.
>
> 12. In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.
>
> 13. In any event, the fact that pregnancy is assimilated to sickness and that the respective provisions of the Ziektewet and the Ziekengeldreglement governing reimbursement of the daily benefits payable in connection with pregnancy are not the same cannot be regarded as evidence of discrimination on grounds of sex within the meaning of the Directive. Lastly, in so far as as an employer's refusal of employment based on the financial consequences of absence due to pregnancy constitutes direct discrimination, it is not necessary to consider whether national provisions such as those mentioned above exert such pressure on the employer that they prompt him to refuse to appoint a pregnant woman, thereby leading to discrimination within the meaning of the Directive.
>
> 14. It follows from the foregoing that the answer to be given to the first question is that an employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.

The second decision is that in *Handels-og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening* 1990 ECR I-3979, given on the same day as the decision in the *Dekker* case. A Mrs. Hertz gave birth to a child after a complicated pregnancy during which she was on sick leave with the consent of her employer. She was given maternity leave, but later took frequent periods of sick leave due to complications arising from her confinement. After these had amounted to 100 days in one year her employer gave her notice of dismissal. Mrs. Hertz complained that the dismissal contravened the Danish equal treatment law, and the Danish Supreme Court referred to the European Court the question whether dismissal on account of absence due to illness attributable to pregnancy or confinement was in breach of the Directive 76/207, the answer to that question being considered relevant to the true interpretation of the Danish equal treatment law. The court answered the question in the negative. After citing various provisions of the Directive the judgment continues:

> 13. It follows from the provisions of the Directive quoted above that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman (see judgment of today's date in Case C-177/88 *Dekker v. V.J.V.-Centrum* [1990] ECR I-3941).

14. On the other hand, the dismissal of a female worker on account of repeated periods of sick leave which are not attributable to pregnancy or confinement does not constitute direct discrimination on grounds of sex, inasmuch as such periods of sick leave would lead to the dismissal of a male worker in the same circumstances.

15. The Directive does not envisage the case of an illness attributable to pregnancy or confinement. It does, however, admit of national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave. During the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence. It is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur.

16. In the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness. Such a pathological condition is therefore covered by the general rules applicable in the event of illness.

17. Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.

It will be seen that the court made a distinction between the normal incidents of pregnancy and confinement and uncommon complications arising from those conditions. It equiparated the latter to illnesses of any kind, including those which could affect only men, and did not regard such complications as being in a special category, notwithstanding that they could affect only women. It refused, however, to make a similar equiparation between normal pregnancy and confinement and illness. In the *Dekker* case the European Court held that the fundamental reason for the refusal of employment was pregnancy, a reason which did not apply to workers of either sex without distinction but which applied exclusively to the female sex, and that this constituted direct discrimination on grounds of sex. That the refusal of employment was not on grounds of pregnancy as such but was on account of the adverse financial consequences to the employer of absence of the worker due to pregnancy was regarded as not material because, in the court's view, the refusal was essentially based on the fact of pregnancy.

The Directive 76/207 does not have direct effect upon the relationship between a worker and an employer who is not the State or an emanation of the State, but nevertheless it is for a United Kingdom court to construe domestic legislation in any field covered by a Community Directive so as to accord with the interpretation of the Directive as laid down by the European Court, if that can be done without distorting the meaning of the domestic legislation: *Duke v. G.E.C. Reliance Ltd.* [1988] AC 618, per Lord Templeman at pp. 639-640. This is so whether the domestic legislation came after or, as in this case, preceded the Directive: *Marleasing S.A. v. La Comercial Internacional De Alimentacion S.A.* [1992] 1 CMLR 305. That was a case where a Spanish company had been founded with the alleged purpose of defrauding the creditors of one of its founders. A provision of the Spanish Civil Code on the validity of contracts laid down that contracts lacking cause or whose cause was unlawful should have no legal effect. A creditor of the company relied upon this provision in order to obtain a declaration that the instrument incorporating the company was invalid. The company relied in its defence upon Article 11 of the First Council Directive 68/151, which contained an exhaustive list of the cases in which the nullity of a company might be declared. The list did not include lack of lawful cause. The Article had not been implemented in Spanish national law. The European Court held that the Spanish courts must not interpret the relevant provision of the Civil Code in such a manner that the nullity of a public limited company might be ordered on grounds other than those listed in Article 11 of the Directive. The question being whether or not that might be done, the European Court said in its judgment at p. 322:

> (8) In order to reply to that question, it should be observed that, as the court pointed out in Case 14/83, *Von Colson and Kamann v. [Land] Nordrhein-Westfalen*, the member-States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 EEC to take all appropriate measures,

whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of member-States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC.

(9) It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

It is to be observed that the provision of Spanish law in issue in that case was of a general character capable of being construed either widely or narrowly. It did not refer specifically to the grounds upon which the nullity of a public limited company might be ordered. If it had done so, and had included among such grounds the case where the company had been formed with the purpose of defrauding creditors of one of the corporators, the Spanish court would have been entitled and bound to give effect to it notwithstanding the terms of the Directive. As the European Court said, a national court must construe a domestic law to accord with the terms of a Directive in the same field only if it is possible to do so. That means that the domestic law must be open to an interpretation consistent with the Directive whether or not it is also open to an interpretation inconsistent with it.

The European Court of Justice did not, in the *Dekker* and *Herz* cases, have to consider the situation where a woman, on account of her pregnancy, will not be able to carry out, at the time when her services are required, the particular job for which she is applying or for which she has been engaged. The two decisions do not give any clear indication whether in such a situation the court would regard the fundamental reason for the refusal to engage the woman or for dismissing her as being her unavailability for the job and not her pregnancy. In the event of the court arriving at a decision that the latter and not the former is the correct view for the purposes of the Directive 76/207, it would be necessary for this House to consider whether it is possible to construe the relevant provisions of the Act of 1975 in such a way as to accord with such decision. Further, it is not impossible to envisage that the sort of situation which existed in the present case might arise in circumstances where the Directive 76/707 has direct application, namely where the employer is the State or an emanation of the State. So I think it appropriate that before final judgment is given on this appeal there should be referred to the European Court of Justice the following question:

> Is it discrimination on grounds of sex contrary to Directive 76/207 for an employer to dismiss a female employee (the appellant)
>
> (a) whom he engaged for the specific purpose of replacing (after training) another female employee during the latter's forthcoming maternity leave,
> (b) when, very shortly after appointment, the employer discovers that the appellant herself will be absent on maternity leave during the maternity leave of the other employee, and the employer dismisses her because he needs the job holder to be at work during that period,
> (c) had the employer known of the pregnancy of the appellant at the date of appointment, she would not have been appointed, and
> (d) the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons?

I understand that all your Lordships agree that there should be a reference accordingly, and that final disposal of the appeal should be postponed until the decision of the European Court of Justice has been made available.

Lord Griffiths

My Lords,

I have the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that further consideration of the appeal should be adjourned until after the question posed by my noble and learned friend has been considered by the European Court of Justice.

Lord Browne-Wilkinson

My Lords,

I have read the speech of my noble and learned friend Lord Keith of Kinkel. For the reasons which he gives I would refer to the European Court of Justice the question which he proposes.

Lord Mustill

My Lords,

I have the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree that further consideration of the appeal should be adjourned until after the question posed by my noble and learned friend has been considered by the European Court of Justice.

Lord Slynn of Hadley

My Lords,

I agree that further consideration of this appeal should be adjourned and that the question posed by my noble and learned friend, Lord Keith of Kinkel, whose speech in draft I have had the opportunity of reading, should be referred to the European Court of Justice pursuant to the third paragraph of Article 177 of the EEC Treaty.